Supreme Court, U.S.
FILED
MAR 16 2015
OFFICE OF THE CLERK

No. 14-981

In The
Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013) ("*Fisher I*").

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioner.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF has litigated for the equality of all persons, regardless of race, and for the application of strict scrutiny to all governmental racial classifications. For example, MSLF attorneys represented the plaintiffs in *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986); *Adarand*

[1] Pursuant to Supreme Court Rule 37.2(a), notice of MSLF's intent to file this amicus curiae brief was received by counsel of record for all parties at least 10 days prior to the due date of this brief and all parties consent to the filing of this amicus curiae brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

Constructors, Inc. v. Peña, 515 U.S. 200 (1995); and *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003). MSLF has also actively participated as amicus curiae in a number of similar cases challenging racial preferences, including the earlier stages of this litigation. *Ricci v. Stefano*, 557 U.S. 557 (2009); *DynaLantic Corp. v. U.S. Dep't of Def.*, 885 F. Supp. 2d 237, 244 (D.D.C. 2012); *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013) ("*Fisher I*"). MSLF brings a unique perspective to bear in this case by examining the nature and requirements of strict scrutiny to demonstrate that the Fifth Circuit abandoned strict scrutiny.

SUMMARY OF ARGUMENT

This Court should grant the Petition because the Fifth Circuit decided an important federal question directly in conflict with this Court's relevant precedent, including this Court's previous decision in this case. In *Fisher I*, this Court vacated the previous decision of the Fifth Circuit because it impermissibly deferred to the University of Texas at Austin's ("University" or "UT") justifications for the race-based aspects of its undergraduate admissions program. This Court clearly stated that UT's program could survive strict scrutiny only if UT demonstrated that no workable race-neutral alternatives would produce UT's purported interest in racial diversity on campus.

On remand, the Fifth Circuit failed to require UT to prove that the race-neutral aspect of UT's admission program or other race-neutral alternatives could achieve UT's purported interest in racial diversity on campus. Although Petitioner demonstrated that the race-neutral aspect of UT's admissions policy had increased diversity of incoming students, the Fifth Circuit dismissed this evidence and acquiesced to UT's argument that the race-neutral aspect of the admissions policy did not achieve enough diversity. The Fifth Circuit then analyzed only two race-neutral programs that UT has adopted in an attempt to increase diversity before concluding that race-neutral alternatives were not sufficient to achieve UT's diversity goals. This lackluster analysis was not strict scrutiny, and conflicts with this Court's instructions that the Fifth Circuit was required to independently analyze whether workable, race-neutral alternatives were available to achieve UT's purported goals.

Furthermore, although this Court stated that diversity could be a compelling interest for UT, it still instructed the Fifth Circuit to determine that UT offered a reasoned, principled explanation of its diversity goals. On remand, however, UT offered an unintelligible explanation for what it wished to achieve with its race-based admissions program. Instead of requiring a more reasoned explanation, the Fifth Circuit deferred to UT's statements that it was not achieving its vague, amorphous goals.

The Fifth Circuit's deferential attitude towards UT demonstrates the need for this Court to reexamine its

decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003). In *Fisher I*, because no party raised the issue, this Court did not reexamine *Grutter*'s holding that a court should defer, to some extent, to a university's academic judgment that achieving a "critical mass" of racial diversity on campus is a compelling interest for a university. As demonstrated by the instant case, however, the goal of "critical mass" can rarely, if ever, be adequately articulated in a way that allows for a narrowly tailored remedy. As a result, if *Grutter* is not overturned, courts will be unable to properly apply strict scrutiny, and will instead defer to a university's purported academic judgment of its diversity goals.

Finally, the Fifth Circuit's decision sets a dangerous precedent for all race-based government programs. As this Court has made clear, the Fourteenth Amendment requires courts to apply the same strict scrutiny review to all race-based government programs. The academic context of this case does not excuse the Fifth Circuit from its duty to strictly scrutinize UT's race-based programs. Therefore, if not overturned, the Fifth Circuit's decision will offer a dangerous example of how governments can justify race-based programs to evade the strictures of strict scrutiny. In order to guarantee equal protection of the laws for all citizens, this Court should grant the Petition.

ARGUMENT

I. THE FIFTH CIRCUIT FAILED TO REQUIRE THE UNIVERSITY TO PROVE THAT IT'S RACE-BASED ADMISSIONS POLICY WAS NECESSARY.

This Court should grant the Petition because the Fifth Circuit's decision conflicts with this Court's previous decision in this case, which decided an important federal question regarding how to properly apply strict scrutiny to race-based government programs. *See* Supreme Court Rule 10(c); *see also In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56 (1895) (An inferior court "cannot vary [a mandate], or examine it for any other purpose than execution; or give any other or further relief; or review it . . . upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded."); *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004) ("Absent exceptional circumstances, the mandate rule compels compliance on remand with the dictates of a superior court. . . ."). This Court instructed the Fifth Circuit, on remand, to "assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." *Fisher I*, 133 S. Ct. at 2421. In its decision, the Fifth Circuit failed to follow this Court's instructions and, therefore, failed to properly apply strict scrutiny.

In its decision, this Court made clear that "[s]trict scrutiny must not be strict in theory but

feeble in fact." *Fisher I*, 133 S. Ct. at 2411. This Court clearly placed the burden on the University to prove "that it is 'necessary' for a university to use race to achieve the educational benefits of diversity." *Id.* at 2420 (quoting *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 305 (1978)). It directed the Fifth Circuit to perform a "searching examination" of the University's means of achieving the educational benefits of diversity. *Id.* Finally, it ordered the Fifth Circuit to determine whether "no workable race-neutral alternatives would produce the educational benefits of diversity." *Id.*

Many legal scholars correctly recognized the monumental importance of this Court's decision. Danielle Holley-Walker, *Defining Race-Conscious Programs in the Fisher Era*, 57 How. L.J. 545, 556 (2014) ("[*Fisher I*] will likely be remembered for re-shaping the narrow tailoring prong of the strict scrutiny standard. . . ."); Meera E. Deo, *Empirically Derived Compelling State Interests in Affirmative Action Jurisprudence*, 65 Hastings L.J. 661, 673 (2014) ("[*Fisher I*] narrows defendants' ability to satisfy narrow tailoring, making strict scrutiny even stricter than it was before."); Carla D. Pratt, *The End of Indeterminacy in Affirmative Action*, 48 Val. U. L. Rev. 535, 553 (2014) ("If race-conscious affirmative action is to survive as a constitutionally permissible policy, lawyers will have to become more specific in the articulation of the diversity interest."); Gail Heriot, *Fisher v. University of Texas: The Court (Belatedly) Attempts to Invoke Reason and Principle*,

2013 Cato Sup. Ct. Rev. 63, 85 (2013) (In *Fisher* [*I*], the Supreme Court "took the opportunity to clarify the applicable standard in broad terms."); John C. Brittain, *Affirmative Action Survives Again in the Supreme Court on a Legal Technicality: An Analysis of Fisher v. University of Texas at Austin*, 57 How. L.J. 963, 977 (2014) ("It remains to be seen [after] *Fisher* [*I*] how the lower courts will interpret the new clarification of the narrowly-tailored prong of the strict scrutiny test." (italics added)). This Court's decision strengthened the role of courts in cases challenging race-based government programs, and made clear that the burden is on the government to demonstrate the necessity of a race-based policy. *Fisher I*, 133 S. Ct. at 2420; Danielle Holley-Walker, *supra*, 57 How. L.J. at 549 ("Justice Kennedy asserts that the narrow tailoring analysis requires courts to examine whether the use of race is 'necessary.' In order to meet the narrow tailoring prong of the strict scrutiny standard, the University must show that they have exhausted race-neutral alternatives.").

The Fifth Circuit, however, did not follow this Court's clear instructions. The court failed to analyze whether the race-based portion of the University's admission policy was necessary to achieve diversity by failing to properly analyze the race-neutral aspect of the University's admission policy, and by failing to

analyze alternative, race-neutral admission policies.[2] *See Fisher I*, 133 S. Ct. at 2420.

With regard to the Top Ten Percent Plan, the race-neutral aspect of the University's admissions policy, the Fifth Circuit recognized that the policy results in admission of a wide-range of students with various backgrounds. *Fisher*, 758 F.3d 655-56. Despite this recognition, the Fifth Circuit adopted the University's argument that a race-neutral admissions policy did not achieve enough diversity, and needed to be supplemented with a race-conscious plan. *Id.* at 656. As explained by Judge Garza, the majority of the panel did not apply strict scrutiny:

> In effect, the University asks this Court to assume that minorities admitted under the Top Ten Percent Law do not demonstrate "diversity within diversity" – that they are somehow more homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review. Thus, the University claims, absent its race-conscious

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[2] For in-state admissions, the University automatically accepts any Texas high school student in the top ten percent of his or her class. *Fisher v. Univ. of Texas at Austin*, 758 F.3d 633, 638 (5th Cir. 2014). To fill the remaining seats available to in-state students, the University conducts a holistic review and purportedly ranks students based on a combination of an academic index score, based on test scores and grades, and a personal achievement index ("PAI") score, based on personal characteristics including race. *Id.* The PAI score is weighted slightly more than the academic index score in the holistic review process. *Id.*

> holistic admissions program, it would lose the minority students necessary to achieving a qualitative critical mass. But it offers no evidence in the record to prove this, and we must therefore refuse to make this assumption. Regrettably, the majority firmly adopts this assumption. . . .

Id. at 669-70 (Garza, J., dissenting).

Furthermore, the Fifth Circuit failed to analyze whether workable, race-neutral alternatives are sufficient to achieve diversity as instructed by this Court. *Fisher I*, 133 S. Ct. at 2420 ("[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, *before turning to racial classifications*, that available, workable race-neutral alternatives do not suffice." (emphasis added)). Instead, the Fifth Circuit looked only at the University's scholarship and outreach programs in a purported attempt to analyze workable, race-neutral alternatives. *Fisher*, 758 F.3d at 647-49. The court stated that the goal of these two programs "'was to convince low income students that money should not be a barrier to attending college'" but concluded that the programs were not sufficient to achieve the University's diversity goals. *Id.* at 649.

This brief discussion of two race-neutral alternatives does not satisfy strict scrutiny. The Fifth Circuit failed to examine any other workable race-neutral alternatives. Even assuming that the majority was correct that the holistic review is necessary to achieve diversity, it never analyzed whether the

racial component of the holistic review is necessary.[3] The court failed to consider what the holistic review process would look like if the University only considered the race-neutral components of diversity. It could have recalculated the personal achievement scores of applicants, excluding any score credited for race, and analyzed what effects, if any, the new calculations had on diversity. Instead, the Fifth Circuit disregarded its duty, and the instructions of this Court, and failed to apply strict scrutiny to UT's admission policy. *Fisher*, 758 F.3d at 671-72 (Garza, J., dissenting) ("Perhaps, based on the structure of the University's admissions process, it is possible that the use of race

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[3] The Fifth Circuit concluded that, because there are test score gaps between races, "if holistic review was not designed to evaluate each individual's contributions to UT Austin's diversity, including those that stem from race, holistic admissions would approach an all-white enterprise." *Fisher*, 758 F.3d at 647. This giant leap to a conclusion is suspect, and does not satisfy strict scrutiny, because the Fifth Circuit failed to consider any other race-neutral alternatives, *e.g.*, getting rid of the holistic review aspect and admitting based on the top fifteen percent of students from all Texas high schools. *See id.* at 670 (Garza, J., dissenting) (disputing the University's conclusion that academic-based admissions do not achieve sufficient diversity). While the court did not need to consider every conceivable race-neutral alternative, strict scrutiny requires that it consider more alternatives than the two alternatives purportedly attempted by the University. *Fisher I*, 133 S. Ct. at 2420 ("Although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, strict scrutiny does require a court to examine with care, and not defer to, a university's serious, good faith consideration of workable race-neutral alternatives." (internal quotations omitted)).

as a factor in calculating an applicant's PAI score incrementally increases the odds that a minority applicant will be admitted to a competitive college within the University. But hypothetical considerations are not enough to meet a state actor's burden under strict scrutiny."). Because the Fifth Circuit clearly disregarded this Court's instructions about how to apply strict scrutiny, this Court should grant the Petition.

II. THE UNIVERSITY FAILED TO CLEARLY DEFINE THE ESSENTIAL EDUCATIONAL GOALS IT HOPED TO ACHIEVE WITH RACE-BASED ADMISSIONS.

The Fifth Circuit also disregarded this Court's instructions by failing to scrutinize UT's claims that it had a compelling interest in achieving racial diversity within the University. In *Fisher I*, this Court found that racial diversity could be considered essential to a university's educational mission, and stated that "some, but not complete, judicial deference" to UT's academic judgment is proper. *Fisher I*, 133 S. Ct. at 2419 (citing *Grutter*, 539 U.S. at 308). Still, this Court did not authorize complete deference to UT's purported compelling interest in achieving racial diversity, and reiterated that "[a] court, of course, should ensure that there is a reasoned, principled explanation for the academic decision." *Id.* This Court made clear that "[s]trict scrutiny is a searching examination, and it is the government that bears the burden to prove 'that the reasons for any [racial]

classification [are] clearly identified and unquestionably legitimate,'. . . ." *Id.* at 2419 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989) and *Fullilove v. Klutznick*, 448 U.S. 448, 532 (1980) (Stevens, J., dissenting)).

In *Croson*, this Court stated that a compelling state interest in racial classifications must be clearly articulated in order to survive strict scrutiny. *Croson*, 488 U.S. at 505. A clearly identified interest is "necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. . . ." *Id.* at 510. Thus, "'[u]nless [the governmental body] *clearly articulates the need and basis* for a racial classification, . . . the court should not uphold'" the race-based policy. *Adarand*, 515 U.S. at 229 (quoting *Fullilove*, 448 U.S. at 545 (Stevens, J., dissenting)) (emphasis in original).

Below, UT failed to clearly articulate the interest it hoped to achieve through race-based admissions. *See Fisher*, 758 F.3d at 666 (Garza, J., dissenting) ("This is the crux of this case – absent a meaningful explanation of its desired ends, the University cannot prove narrow tailoring under its strict scrutiny burden."). Parroting the language of *Grutter*, UT stated that achieving a "critical mass" of campus diversity was essential to achieving its educational mission. *Id.* UT, however, failed to explain what constitutes "critical mass."

Instead of scrutinizing UT's purported diversity goals, the Fifth Circuit accepted UT's argument

without analysis. The Fifth Circuit concluded that, while the race-based aspects of the admission program did not significantly increase the number of racial minorities, "[t]he numbers support UT Austin's argument that its holistic use of race in pursuit of diversity is not about quotas or targets, but about its focus upon individuals. . . ." *Fisher*, 758 F.3d at 654. If UT's diversity goals were about individuals, however, then it needed to explain why racial diversity, rather than diversity of other traits, was a necessary aspect of its admissions program. UT also needed to clearly explain what goals it hoped to achieve through race-based admissions. Instead, UT offered "a nebulous amalgam of factors – enrollment data, racial isolation, racial climate, and 'the educational benefits of diversity' – that its internal periodic review is calibrated to detect." *Id* at 673 (Garza, J., dissenting). By accepting these purported diversity goals at face value, the majority failed to provide any meaningful review of UT's diversity goals. Accordingly, this Court should grant the Petition to ensure meaningful review of UT's race-based admissions program.

III. THE UNIVERSITY'S INABILITY TO CLEARLY DEFINE ITS EDUCATIONAL GOALS DEMONSTRATES THE NEED FOR THIS COURT TO REEXAMINE *GRUTTER*.

UT's attempted articulations of its "critical mass" goals demonstrate the need to reexamine whether a court should accord any deference to a university's academic judgment that diversity is essential to its

academic mission. In *Fisher I*, this Court accepted UT's purported diversity goal based on this Court's previous decision in *Grutter* because no party asked this Court to reexamine *Grutter*. 133 S. Ct. at 2419. Accordingly, this Court concluded that the need for student body diversity is "an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*." *Id.* As demonstrated above, authorizing deference to UT's justification for race-based admission policies allowed the Fifth Circuit to accept an unarticulated objective that made scrutinizing UT's admissions policy nearly impossible. Instead, strict scrutiny can only be achieved by scrutinizing the purported state interest, as well as the means for achieving that interest. *See Fisher*, 758 F.3d at 674 (Garza, J., dissenting) ("The University's burden is to prove that *its own* use of racial classifications is necessary and narrowly tailored for achieving *its own* diversity objectives." (emphasis in original)). As stated in the Petition, "[i]f *Fisher I* permits UT to prevail here, the Court will need to rethink its endorsement of *Grutter*'s diversity interest. . . ." Petition at 30. Because Petitioners have expressly requested this Court to reexamine *Grutter*, this Court should grant the Petition.

A. *Grutter* Abandoned Longstanding Equal Protection Precedent.

In *Grutter*, the University of Michigan Law School argued that the compelling interest for its racially discriminatory admissions policy was to

obtain "the educational benefits that flow from a diverse student body." 539 U.S. at 328. The law school asserted that these benefits could be achieved only when a "critical mass" of underrepresented minority students had been admitted. *Id.* at 329. Like UT, the University of Michigan Law School in *Grutter* could neither describe nor quantify critical mass:

> "[C]ritical mass" means "meaningful numbers" or "meaningful representation," which . . . [is] a number that encourages underrepresented minority students to participate in the classroom and not feel isolated. . . . [T]here *is no number, percentage, or range of numbers . . . that constitute critical mass.*

Id. at 318 (emphasis added); *id.* at 319 ("[C]ritical mass means numbers such that underrepresented minority students do not feel . . . like spokespersons for their race.").

Unfortunately, this Court accepted the University of Michigan's vague definition and did not require the law school to either define or quantify "critical mass" or establish how it might determine when "critical mass" was achieved. *Id.* at 335 ("[A] permissible goal . . . requires only a good faith effort . . . to come within a range demarcated by the goal itself.") (internal quotations omitted). This Court then simply deferred to the law school's judgment, ruling that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." *Grutter*, 539 U.S. at 328. In short,

the *Grutter* majority seemed to suggest that this Court lacked competence to strictly scrutinize the law school's racially discriminatory action, ruling that such "complex educational judgments . . . lie primarily within the expertise of the university." *Id.*

This Court's decision in *Grutter* is inconsistent with the requirements that a court must apply strict scrutiny to race-based government programs. *See Fisher I*, 133 S. Ct. at 2419 ("There is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity." (citing *id.* at 2422 (Scalia, J., concurring); *id.* at 2423-24 (Thomas, J., concurring); *id.* at 2432-33 (Ginsburg, J., dissenting)). Contrary to *Adarand* and *Croson*, the *Grutter* majority ruled that "'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary'" by the plaintiff. *Id.* at 329. As this Court made clear in previous cases, however, "more than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system." *Adarand*, 515 U.S. at 226 (internal quotation omitted).

In fact, in *Croson*, this Court strongly condemned "blind judicial deference to legislative or executive pronouncements of" the need for race-based classification. 488 U.S. at 501. The presumption of validity afforded to school's diversity goals also violates the long-standing principle that any racial classification is "presumptively invalid." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). Instead of deferring

to a school's justification for race-based admissions, the Fourteenth Amendment requires a court to conduct a skeptical, searching examination of the ends, as well as the means, of a race-based government program. *See Adarand*, 515 U.S. at 223, 227.

In short, the majority's analysis in *Grutter* bears a striking resemblance to rational basis scrutiny, rather than strict scrutiny. *See Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting) ("The Court . . . does not apply strict scrutiny [and] undermines both the test and its own controlling precedents.") Thus, the *Grutter* majority's decision violated well-established equal protection jurisprudence, including *Adarand* and *Croson*, and this Court should grant the Petition so that it may revisit *Grutter*.

B. "Critical Mass" Is An Indefinable Concept That Cannot Be Addressed By A Narrowly Tailored Remedy.

Furthermore, it is unclear whether a "critical mass" justification could ever survive strict scrutiny. As demonstrated above, UT was unable to define its "critical mass" goal with any objective standards. Because this Court did not overturn *Grutter*, however, the Fifth Circuit deferred to UT's unintelligible goals. *Fisher*, 758 F.3d at 642-43.

In order to survive strict scrutiny, a race-based program must have an "exact connection between justification and classification. . . ." *Adarand*, 515 U.S. at 229 (internal quotations omitted). The goal of

reaching a "critical mass" of diversity on campus makes analyzing a connection to a university's admission criteria nearly impossible because "[t]here is no number that constitutes 'critical mass.'" *Grutter*, 539 U.S. at 318. Because there are no objective criteria for "critical mass," "attempted articulations of 'critical mass'" will likely be "subjective, circular, or tautological." *Fisher*, 758 F.3d at 667 (Garza, J., dissenting). In other words, it is likely that "critical mass" is "too amorphous a basis for imposing a racially classified remedy . . . [and] has little probative value in supporting a race-conscious measure." *Croson*, 488 U.S. at 497. Accordingly, no court can adequately determine whether a "critical mass" of minority students is present and whether racially discriminatory admissions policies are required to achieve that "critical mass." This Court should grant the Petition in order to reexamine *Grutter*, and require universities to articulate objective goals that a court can objectively scrutinize.

IV. THE FIFTH CIRCUIT'S DECISION SETS A DANGEROUS PRECEDENT FOR ALL RACE-BASED GOVERNMENT PROGRAMS.

This Court should also grant the Petition because of the exceptional importance of the case to judicial review of all race-based government programs. *See* Supreme Court Rule 10(c). As this Court made clear, "higher-education affirmative action cases do not stand apart from 'broader equal protection jurisprudence,'. . . . Put simply, there is no special form of

strict scrutiny unique to higher education admissions decisions." *Fisher*, 758 F.3d at 665 (Garza, J., dissenting) (quoting *Fisher I*, 133 S. Ct. at 2418). Therefore, if not reversed, the Fifth Circuit's decision will set a dangerous precedent for what constitutes strict scrutiny in all equal protection cases.

The "central purpose [of the Equal Protection Clause of the Fourteenth Amendment] is to prevent the states from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)). It was adopted to "do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). Accordingly, courts must apply strict scrutiny to all race-based classifications, regardless of the government's justifications for such classifications. *Adarand*, 515 U.S. at 227 ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

It is imperative for a court to correctly apply strict scrutiny to racial classifications because "[r]acial classifications of any sort pose the risk of lasting harm to our society." *Shaw*, 509 U.S. at 657. Indeed, "[p]referment by race . . . can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and the idea of equality." *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting). Classifications based on race threaten to "balkanize us into competing racial factions;

it threatens to carry us further from the goal of a political system in which race no longer matters." *Shaw*, 509 U.S. at 657. Thus, "[t]he equal protection principle," that was "purchased at the price of immeasurable human suffering," reflects "our Nation's understanding that such classifications ultimately have a destructive impact on the individual and society." *Adarand*, 515 U.S. at 240 (Thomas, J., concurring); *see also Croson*, 488 U.S. at 521 (Scalia, J., concurring) (discrimination based on race is "illegal, immoral, unconstitutional, inherently wrong, and destructive of a democratic society").

This is true of even so-called "benign" racial classifications. In *Croson*, this Court ruled that "recitation of a 'benign' or legitimate purpose for a racial classification[, such as racial diversity in education,] is entitled to little or no weight" because "racial classifications are suspect and . . . simple legislative assurances of good intention cannot suffice." *Croson*, 488 U.S. at 500. As in *Croson*, this Court in *Adarand* ruled that "good intentions alone are not enough to sustain supposedly 'benign' racial classification[s,]" because such classifications would "inevitably [be] perceived by many as resting on the assumption that those who are granted this special preference are less qualified . . . purely by their race." *Id.* at 228-29. "Benign" racial classifications serve only to "exacerbate rather than reduce racial prejudice" and "will delay the time when race will become . . . truly irrelevant." *Id.* Consequently, "*all* racial classifications, imposed by *whatever* federal, state or local

governmental actor, must be analyzed . . . under strict scrutiny." *Id.* at 227 (emphasis added).

Furthermore, "[c]lassifications based on race carry a danger of stigmatic harm" to the individuals benefitted by racial preferment. *Croson*, 488 U.S. at 493. And such racial classifications "may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Id.* Thus, a racial classification:

> "[I]nevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception . . . can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become truly irrelevant[.]"

Adarand, 515 U.S. at 229 (quoting *Fullilove*, 448 U.S. at 545 (Stevens, J., dissenting)); *see also Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting) ("The dangers of such classifications are clear[–][t]hey endorse race-based reasoning and the conception of a nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."). Indeed, "[s]uch policies may embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts – their very worth as citizens – according to a criterion barred to the Government by history and the Constitution." *Id.* at 604 (O'Connor, J., dissenting). In fact, "[r]acial classifications, whether providing benefits to or burdening particular racial or

ethnic groups, may stigmatize those groups singled out for different treatment and may create considerable tension with the Nation's widely shared commitment to evaluating individuals upon their individual merit." *Id.*

Therefore, "[u]nder our Constitution, there can be no such thing as either a creditor or a debtor race . . . [a] concept [that] is alien to the Constitution's focus on the individual." *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and in judgment). To the contrary, "[i]n the eyes of government, we are just one race here [–] American[.]" *Id.* In other words, there is no "racial paternalism exception to the principal of equal protection" and the requirement that courts apply strict scrutiny to all government classifications based on race. *Id.* at 240 (Thomas, J., concurring in part and in judgment).

The essence of strict scrutiny is that a court may not defer to the judgment of the government, or its professions of good faith, because "[b]lind judicial deference to legislative or executive pronouncements, of necessity, has no place in equal protection analysis." *Croson*, 488 U.S. at 501; *Fisher I*, 133 S. Ct. at 2421. "The presumption [of validity] is not present when a State has enacted legislation whose purpose or effect is to create classes based upon racial criteria, since racial classifications, in a constitutional sense, are inherently 'suspect.'" *Parham v. Hughes*, 441 U.S. 347, 351 (1979). Therefore, "[a] racial classification, regardless of purported motivation, is *presumptively invalid* and will be upheld only upon an *extraordinary*

justification." *Pers. Adm'r of Mass.*, 442 U.S. at 272 (all emphasis added).

The decision below now provides an erroneous example of what constitutes "strict scrutiny" post-*Fisher*. The Fifth Circuit's failure to adequately analyze race-neutral alternatives, and its improper deference to UT, is sure to affect judicial review of other race-based government programs. *See* John C. Brittain, *supra*, 57 How. L.J. at 977 ("It remains to be seen [after] *Fisher* [*I*] how the lower courts will interpret the new clarification of the narrowly-tailored prong of the strict scrutiny test." (italics added)). This Court made clear that a race-based program can only be constitutional if it is necessary to achieve a compelling state interest, and only if no race-neutral alternative is sufficient to achieve that compelling state interest. *Fisher I*, 133 S. Ct. at 2420. The Fifth Circuit's opinion, however, erroneously concludes that a court only needs to take a cursory look at the government's justifications before upholding a race-based government program. Accordingly, this Court should grant the Petition.

CONCLUSION

The Fifth Circuit failed to apply strict scrutiny to the race-based aspect of UT's admissions policy, and instead impermissibly deferred to the University's justification for the policy. In order to ensure that

courts continue to apply strict scrutiny correctly, this Court should grant the Petition for Writ of Certiorari.

DATED this 16th day of March 2015.

Respectfully submitted,

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